

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :29.01.2019

Pronounced on :13.02.2019

Coram:

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

Second Appeal No.1060 of 2004

and

C.M.P.No.191 of 2015

1.Dr.Panneerselvam

2.Saidani

3.Abdul Nazeer

4.Abdul Alim

5.Abdul Nayeem

6.Yasmin

7.Nazim

8.Rasia Beebi(deceased)

9.Mohammed Beebi

10.Mohammed Yusuf

11.Kamurunnisa

12.Shanawaz

13.Akthar Ali

(8th appellant died. Memo dated 10.01.2019 presented in Court is recorded. Appellant 10 to 13 are recorded as legal heirs of the deceased 8th appellant vide order of Court dated 10.01.2019 made in S.A.No.1060 of 2004(Dr.GJJ))

.. Appellants

/versus/

1.Padmasini

2.Somasundaram

3.Abdul Asif

.. Respondents

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 21.11.2003 made in A.S.No.35 of 2003 on the file of the Additional District Court(Fast Track Court No.2), Cuddalore confirming the judgment and decree dated 19.10.2000 made in O.S.No.234 of 1996 on the file of Subordinate Court, Panruti.

For Appellants :Mrs.Chithra Sampath, Sr.C
for Mr.T.S.Baskaran

For Respondents :Mr.S.Parthasarathy, Sr.C. for
Mr.K.A.Vimal Kumar for R1 and R2

Mr.T.R.Rajagopalan, Sr.C for
Mr.M.S.Palanichamy for R3

J U D G M E N T

The appellants are the defendants in the suit. Respondents 1 and 2 in the appeal are the plaintiffs. The third respondent is the fifth defendant. The appeal is preferred against the concurrent finding of the Courts below in the suit filed for declaration of title in respect of A and B schedule properties, Mandatory Injunction to remove the constructions made on A and B schedule properties and to hand over the vacant possession to the plaintiffs.

2. The case of the plaintiffs is that the suit property described under schedule A and B of the plaint, originally belongs to one Meenakshi Ammal, who is the maternal grandmother of the plaintiffs. The property was purchased by Meenakshi Ammal under a sale deed dated 25.06.1923. In the year 1945, Meenakshi Ammal died leaving her son and daughter viz., Ramasamy and Rengammal. Ramasamy, Son of Meenakshi Ammal left the family forty years ago and not heard thereafter. Rengammal the daughter of Meenakshi Ammal, inherited the property as per the law prevailing at that point of time. Rengammal got married Rajagopal. The plaintiffs are son and daughter of Rengammal.

3. Schedule 'A' and 'B' properties and the property East of it are assessed to land revenue. 'B' schedule property is situated on the east of 'A' schedule property. Both 'A' and 'B' schedule properties are situated on the west of the remaining property which are not owned by the plaintiffs. The property on the immediate east of 'B' schedule property originally belongs to Meenakshi Ammal, which she sold in the year 1924 to one Hassan Khan measuring 30 feet East-West, 105 feet North-South. The immediate West of it measuring 48 feet East-West, North-South 105 feet was sold by Rengammal to Muthaiya Pillai on 15.06.1950. In the said sale deed, Ramasamy brother of Rengammal was also named as an Executor, at the instance of the purchaser Muthia Pillai. This property, after passing through several hands, ultimately purchased by Thamarai Ponnalar, W/o James Jayakumar. Property further East, which also originally belongs to Meenakshi Ammal, after passing through several hands, ultimately purchased by Abdul Rahman, who is the younger brother of defendants 1 and 2 (Abdul Munaf Sahib, Abdul Jabbar Sahib).

4. The western boundary of the property has been wrongly mentioned as Perumal temple in all the documents, though it should have been mentioned as remaining property of Meenakshi Ammal. This error was not noticed for long years by any of the parties to the documents, though the ownership was always with Meenakshi Ammal and her successors-in-interest. More particularly, Thamarai Ponnalar nor Abdul Rahman nor their

predecessors-in-interest were never in possession of suit 'A' and 'B' schedule properties. They were exercising ownership only over the property located on the East of suit 'B' schedule property being vacant land. The plaintiffs were living away from the property. The defendants taking advantage have entered into 'A' and 'B' schedule property claiming ownership. When the third defendant tried to put up construction in the suit schedule property, the encroachment made by the defendants came to the knowledge of the plaintiffs. When the plaintiffs questioned the third defendant, they were informed that they have purchased 'B' schedule property from one Kathiresan claiming to be the power of attorney of James Jayakumar. Further investigation made by the plaintiffs unravelled that several fraudulent and clandestine documents were created by persons, who have no title to the property. Hence, relief of declaration and mandatory injunction have been sought for.

5. The description of properties in the suit schedule is extracted below for easy understanding of the dispute involved in this appeal:-

சொத்து விவரம்
“ஏ” செட்டியூல்

கடலூர் ரிடி. பண்ணுட்டி சப்.டி. வடகைலாசம் கிராமம் பழைய சர்வே நெம்பர் 51/5-0.27 சென்டில் 2588 சதுரடி. (சுமார் 6 சென்ட் அளவுள்ள இடம்). சக்குபந்தி/ போலீஸ் லைன் பாட்டைக்கு வடக்கு, திருக்கோவிலுர் தியாகலீச பெருமாள் கோவில் மானிய இடத்திற்கு தெற்கு, கிழக்கு, பி செட்டியூல் சொத்துக்கு மேற்கு, இதன் மத்தியில் கி.மே.ஜாதியடி தென்புறம் 35½ அடி, வடப்புறம் 54 அடி, தெ.வ.ஜாதியடி மேற்புறம் 52 அடி, கீழ்ப்புறம் 64 அடி. இதுதனுடைய பதிய சர்வே எண்கள் டவுன் சர்வே 119, 117, 113, 115, 116, 120, 114ல் ஒரு பகுதி.

“பி” செட்டியூல்

கடலூர் ரிடி. பண்ணுட்டி சப்.டி. வடகைலாசம் கிராமம் பழைய சர்வே நெம்பர் 51/5-0.27 சென்டில் 2515 சதுரடி காலிமனை. (சுமார் 6 சென்ட் அளவுள்ள இடம்). சக்குபந்தி/ போலீஸ் லைன் பாட்டைக்கு வடக்கு, திருக்கோவிலுர் தியாகலீச பெருமாள் கோவில் மானிய இடத்திற்கு தெற்கு, “ஏ” செட்டியூல் சொத்துக்கு கிழக்கு, தாமரைபொன்மலர் இடத்திற்கு மேற்கு. இதன் மத்தியில் கி.மே.ஜாதியடி தென்புறம் 37½ அடி, வடப்புறம் 37 அடி, தெ.வ.ஜாதியடி மேல்புறம் 62 அடி, கீழ்ப்புறம் 73 அடி. இதுதனுடைய பதிய சர்வே எண்கள் டவுன் சர்வே 112ல் ஒரு பகுதி. 114ல் ஒரு பகுதி.

6. Defendants 1 to 3 had filed a common written statement, wherein it is contended that, the description of the properties is not correct. They admit that the suit 'A' and 'B' Schedule property and the property situated on the east originally belongs to Meenakshi Ammal, who purchased under a registered sale deed on 25.06.1923. During her life time, Meenakshi Ammal sold 13 cents of the land on the eastern portion

to Hassankhan Sahib and retained 14 cents on the western portion. On the death of Meenakshi Ammal, only 14 cents of the land devolved upon her children namely, Ramasamy and Rengammal. They both sold their land on the western portion to Muthaiya Pillai under a registered sale deed dated 15.06.1950. Though the sale deed executed by Ramasamy and Rengammal in favour of Muthaiya Pillai mentions the extent of land as 12 cents, the entire 14 cents was sold under this document. The property purchased by Muthia Pillai runs up to temple maniyam on the West. The eastern boundary shown in the sale deed of Muthaiya Pillai is not correct. It should have been shown as the property of Hassankhan Shahib. After alienating 13 cents of land by Meenakshi Ammal and the balance 14 cents sold by her children, nothing left for Meenakshi Ammal's family in the said survey number. The property, which was sold to Muthia Pillai in the year 1950, was purchased by one Subhankhan Sahib under a sale deed dated 14.05.1956. In turn, Subhankhan Sahib sold the property to Kairoon Beevi under a registered sale deed dated 24.02.1958. Saraswathi ammal, who purchased the property on 24.02.1958 from Kairoon Beevi, retaining east west 25 feet on the eastern side and sold the balance of 25 feet to one Mohammed Ismail on 09.03.1959. Later, Saraswathi ammal sold the eastern portion, also to one Piyari Jan on 25.04.1959. Mohammed Ismail and Piyari Jan exchanged their portions under exchange deed dated 16.02.1966. Immediately thereafter Piyari Jan sold the property to one minor James Jayakumar represented by his mother Nallamuthu Ammal under a registered sale deed dated 21.03.1966.

7. A portion of the property, which was purchased in the name of minor James Jayakumar, was subsequently sold to the third defendant through his Power Agent Kathiresan on 15.09.1993. That portion is 'B' schedule property. The portion retained by James Jayakumar was settled in favour of his wife Thamari Ponmalar. The portion of the property, which was purchased by Mohammed Ismail from Saraswathi Ammal, was divided among the family members of Mohammed Ismail, vide, registered partition deed dated 07.05.1987. Defendants 1 and 2 are the sons of Mohammed Ismail. Under the registered partition deed, the first defendant was allotted southern half of 'A' schedule property and the second defendant was allotted northern half of 'A' schedule property. These defendants 1 and 2 are the absolute owners of 'A' schedule property.

8. Tracing their title in the manner prescribed above, defendants 1 to 3 have contended that they are in long, continuous and interrupted possession of 'A' and 'B' schedule property adverse to the interest of the plaintiffs. After executing the sale deed on 15.06.1950 in favour of Muthaiya Pillai, Rengammal and Ramasamy had no property at their disposal in S.No.51/5. Therefore, the plaintiffs, who claim to

be the legal heirs of Rengammal have no right in S.No.51/5 including the suit schedule 'A' and 'B' properties. Even if they had any title, they had lost the title due to ouster. The defendants have put up construction in the 'A' and 'B' schedule property and the buildings are assessed to property tax. Therefore, the plea of possession follows title will not apply in this case.

9. The defendants had also denied the contention of the plaintiffs that the western boundary of the property has wrongly mentioned as temple maniyam. Having sold 13 cents of land to Hassankhan Sahib on 06.09.1924, the property left with Meenakshi Ammal was the portion of the land falling west of Hassan Khan. Contenting that the measurement shown in the document is not correct and only boundary will prevail over the measurement, it is averred in the written statement that it is absolutely false to say that schedule 'A' and 'B' properties are situated on the west of the properties sold by Meenakshi Ammal and her children Ramasamy and Rengammal.

10. As per the written statement, 'A' schedule property is in possession of defendants 1 and 2. In the B schedule property, the third defendant has put up construction at the cost of Rs.10 lakhs and the plaintiffs having slept over and allowed the third party to deal with the property absolutely for several decades. They are not entitled to seek either recovery of possession or mandatory injunction. The defendants are the bona fide purchasers for value from the ostensible owners. Hence, the suit is liable to be dismissed.

11. The trial Court, based on the pleadings, framed the following issues:

1. Whether the suit is barred by limitation?
2. Whether the suit is bad for non-joinder of necessary parties?
3. Whether the suit has not been properly valued for the purpose of Court Fees?
4. Whether the plaintiffs have title to the suit properties?
5. Whether the plaintiffs are entitled to the relief of declaration of title as prayed for?
6. Whether the plaintiffs are entitled for the relief of mandatory injunction against 1 and 2 defendants as prayed for ?

7. Whether the plaintiffs are entitled to the relief of mandatory injunction against the 3rd defendant as prayed for?

8. Whether the plaintiffs are entitled to future mesne profits?

9. What other relief the plaintiffs are entitled to?

Additional issues:

Whether the defendants have prescribed title to the suit properties by adverse possession?

12. On the side of the plaintiffs PW1 to PW4 were examined and 24 exhibits were marked as Exs.A1 to A24. On the side of the defendants, DW-1 to DW-6 were examined and 57 exhibits were marked as Exs.B1 to B57. 10 documents were marked as Court Exhibits as Ex.C1 to Ex.C10.

13. The trial Court decreed the suit and granted time to the defendants to vacate and hand over the vacant portion to the plaintiffs. The trial Court has arrived at the above decision based on the following evidence:

14. Under Ex.A1-sale deed dated 25.06.1923 Meenakshi Ammal had purchased 27 cents of land in S.No.51/5. Under Ex.A4, she sold a portion of the land on the eastern extreme measuring 30 feet East-West, 105 feet North-South to one Hassankhan Sahib. The plaintiffs are legal heirs of Rengammal. The relationship are not denied by the defendants. The averment Ramasamy, S/o Meenakshi Ammal not heard for several years is not disputed by the defendants and they have not placed any document to infer that Ramasamy had any other legal heir to succeed his share. Thus, Rengammal had inherited the property of Meenakshi Ammal, which she retained after alienating a portion to Hassan khan. Under Ex.A10 Rengammal and her brother Ramasamy have sold 48 feet East-West, 105 feet North-South of land to one Muthaiya Pillai. While the defendants contents that this sale deed covers the entire 14 cents retained by Meenakshi Ammal, after selling 13 cents to Hassankhan Sahib earlier, the trial Court has accepted the contention of the plaintiffs that when the boundary are not properly described, linear measurement given in the sale deed alone has to be taken in to consideration and has held that Muthaiya Pillai has purchased only 48 feet x 105 feet of land and only to that extent he can alienate. The defendants, who trace the title from Muthaiya Pillai cannot have anything more than, what Muthaiya Pillai had purchased from Meenakshi Ammal.

15. After discussing the description of boundaries mentioned in the sale deeds, the trial Court has observed that the property purchased by Muthaiya Pillai under Ex.A10 has been sold to Subhankhan Sahib under Ex.A11 on 14.05.1956. In this deed also apart from linear measurement, the extent of the land is mentioned as 12 cents only. In Ex.A11 East and South boundaries are not correctly mentioned. This error reflects in Ex.A12-sale deed. Under Ex.A13, Kairoon Beevi has sold East-West 23 feet; North-South 105 feet of land to Saraswathi Ammal on 03.12.1958 and the balance portion retained by Kairoon Beevi which she purchased under Ex.A12 has been sold subsequently to Mohammed Ismail under Ex.A15. Except this sale deed Ex.A15, in all the previous documents admittedly, the boundaries are not properly furnished.

16. Therefore, on a cumulative assessment of the description made in the respective documents and the admission made by the parties, the trial Court held that the boundaries are not properly mentioned in most of the documents. Also the extent is not properly mentioned. The linear measurement alone found to be consistent in all these documents. Hence, the trial Court has arrived at the conclusion that the title in respect of 'A' and 'B' schedule property are with the plaintiffs and it was the vacant site till recently. Hence, possession follows title.

17. While considering the exchange deed between Piyari Jan and Mohammed Ismail, the trial Court has pointed out that Mohammed Ismail has purchased a portion of the property in S.No.51/5 under Ex.A15 and Piyari Jan has purchased a portion of the property in S.No.51/5 under Ex.A14. Except the properties, which are covered under Exs.A14 and A15, neither Mohammed Ismail nor Piyari Jan had any other property in S.No.51/5. While so, they both have created exchange deed by including the suit properties and claiming as if they have right over these properties. They have artificially divided the land into three parts and created the document Ex.A21 allotting two parts to Mohammed Ismail and one part to Piyari Jan. The properties covered under the sale deeds Exs.A14 and A15 are situated on the East of the suit property. When the properties purchased by them does not include the suit property by executing the exchange deed Ex.A21, they have created title for themselves on the suit property allotting 'A' schedule property to Mohammed Ismail and 'B' schedule property to Piyari Jan. The trial Court, on further analysis of the document, has also pointed out that based upon the exchange deed Ex.A21, which itself is a outcome of fraudulent intention to grab the properties of the plaintiffs, Piyari Jan has sold the property to minor James Jayakumar represented by his mother Nallamuthu Ammal vide sale deed marked as Ex.B45. This deed includes not only the

property, which Mohammed Ismail purchased from Saraswathi Ammal and exchanged with Piyari Jan, but also the land owned by the plaintiffs wrongly included in the exchange deed Ex.A21. Immediately after Minor James Jayakumar attained majority, he has sold the portion of the land, which Piyarijan sold to him, without any title, to the third defendant and retained the land, which Piyari Jan purchased under Ex.A14 and settled that portion of the land in favour of his wife Thamarai Ponmalar under Ex.A24.

18. The trial Court has also drawn adverse inference from the conduct of the James Jayakumar, who has settled the portion of the property, which had perfect title, in favour of his wife and given power of attorney to one Kathiresan to deal with the property, which he has purchased from Piyari Jan without proper. The power agent Kathiresan, on the strength of the power of attorney document, has sold the property to the third defendant on the same day, James Jayakumar settled the property in favour of his wife Thamarai Ponmalar. James Jayakumar has been examined as DW-5 and his power agent has been examined as DW-6. In the cross examination, it has been suggested that the entire transaction has been engineered and designed by Kathiresan and others.

19. It has also been elucidated through these witnesses that when the property was sold to third defendant, it was only a vacant side. While coming to the plea of the third defendant that he has purchased 'B' schedule property as a bona fide purchaser, the trial Court has pointed out that without ascertaining how the vendor has derived title, the third defendant has purchased the property. The document prior to the exchange deed Ex.A21 will clearly disclose that Piyari Jan and Mohammed Ismail have dealt with the properties which they do not have title. They have exchanged among themselves the properties which they had no right and this exchange deed is not a deed of title for the vendors of the third defendant to alienate the 'B' schedule property. Thus, after analysing each and other document placed before it, the trial Court has come to the conclusion allowing the suit. The first appellate Court also confirmed the same.

20. Against the concurrent finding, the Second Appeal is preferred by the defendants.

21. The learned Senior Counsel appearing for the appellants made a forcible submission that Meenakshi Ammal has purchased only 27 cents of land. Having sold 13 cents of land to Hassankhan Sahib, she had only 14 cents at her hand, when she died. Her son and daughter had alienated that property to Muthaiya Pillai, without retaining any portion for them. Though

the sale deed would say, it is only 12 cents been alienated, impliedly, the entire 14 cents has been conveyed to Muthaiya Pillai. Later, Muthaiya Pillai has sold the property and the properties have changed various hands.

22. As far as the plaintiffs are concern, they have no right or title over the suit schedule property, soon after their mother Rengammal and maternal uncle Ramasamy sold the property to Muthaiya Pillai vide Ex.A10 dated 15.06.1950. Contending that the suit ought to have been dismissed for non-joinder of necessary party namely, Hassankhan Sahib, the first purchaser of Meenakshi Ammal, the Senior Counsel for the appellants further submitted that the Courts below have erroneously held that the plaintiffs are entitled to the extent of 12 cents of land in the suit survey number. Pointing out that in Ex.A10, vendors have not retained any portion of the land in the said survey number, implicitly indicates that they have parted away the entire land held in their possession. More particularly, when the western boundary of the sale deed is shown as temple maniyam and not the land of the vendor, the predecessor-in-interest of defendants 1 to 3, Muthaiya Pillai had purchased the total extent of 5040 sq.ft (48 feet x 105 feet) which is equivalent to 11.57 cents. Actually, the land available was 14 cents but in the recitals of Ex.A1, the extent is shown as 12 cents. There is no much difference in the extent. While the recitals in Exs.A14 and A15 indicate the existence of hut, the conclusion of the Courts below that the disputed land remained vacant, is also incorrect.

23. The payment of tax by the defendants and their predecessors- in-title has been established through the receipts marked as Exs.B46,49,52 to 57. Despite the documentary proof, the Courts below have wrongly negatived the evidence placed by the defendants. Even if the measurement prevails over the extent, which is not correct the preposition of law, the case of the plaintiffs cannot be entertained, since out of 27 cents purchased by Meenakshi Ammal substantially the entire land has been subsequently sold under two sale deeds and nothing remains for the plaintiffs to claim through Meenakshi Ammal or her daughter Rengammal.

24. This Court at the time of admission has formulated the following Substantial Questions of Law:

1. Whether the Courts below were right in holding that the suit as framed was maintainable, without making Hasan Khan as a necessary party to the suit?

2. Whether the Courts below were correct in holding that boundaries did not prevail over extent when admittedly the north-south measurements given in the sale

deed i.e 105' was incorrect, even as per the
plaint description of the suit property?

25. The claim of the plaintiffs is primarily based on three documents, which are exhibited as Exs.A1, A4 and Ex.A10. They are: (1) sale deeds executed by Dharmalinga Chettiar to Meenakshi Ammal on 25.06.1923; (2) sale deed executed by Meenakshi Ammal to Hassan Khan on 06.09.1924; and (3) sale deed executed by Ramasamy and Rengammal to Muthaiya Pillai on 15.06.1950.

26. The property under dispute is covered under the above three deeds. The parties in dispute trace their right only through these three documents. Earliest among these documents Ex.A1 is dated 25.06.1923. The property dealt in this deed is 27 cents of land in S.No.51/5. The length and breadth on either side of this property are not same. The western side breadth is lesser than the eastern side breadth. The field map of S.No.51/5 is marked as Ex.A2. The linear measurement of this land on the northern side is 163 feet. Under Ex.A4, Meenakshi Ammal had sold portion of the land on the east to Hassankhan Sahib. The linear measurement of the property sold is 30 feet x 105 feet. Under Ex.A10, Ramasamy and Regammal had sold 48 feet x 105 feet to Muthaia Pillai. While in the sale deed Ex.A4, the extent is mentioned as 13 cents and in the sale deed Ex.A10, the extent is mentioned as 12 cents. The defendants admit that as per the linear measurement, the extent of the property will be around 11.5 cents only. If 48 x 105 feet itself is less than 12 cents, naturally field with 30 feet x 105 feet measurement cannot be 13 cents as mentioned in Ex.A4. Therefore, to decide the dispute, the extent found in Exs.A4 and A10 cannot be relied.

27. Whereas the linear measurement alone is inconsonance with the parent source document Ex.A1. Then, it is obviously clear that after alienating 30 feet x 105 feet of land to Hassankhan Sahib under Ex.A4 and 48 feet x 105 feet land to Muthaiya Pillai under Ex.A10, the balance land is left for the plaintiffs, who are the descendants of Meenakshi Ammal through her daughter Rengammal.

28. The claim of the defendants that under Ex.A10, Rengammal and her brother Ramasamy sold the entire property of Meenakshi Ammal excluding the land sold to Hassan khan Sahib is contrary to the recital of the deed Ex.A10. In the sale deed Ex.A10, the recital is very certain about the linear measurement. On the East-West, it is 48 feet and North-South 105 feet. As pointed out earlier, the entire length of the northern side of S.No.51/5 is 163 feet, as per FM sketch Ex.A2. Under Ex.A4 and Ex.A10, total extent of 78 feet (30 feet + 48 feet) on the East - West only has been alienated and balance land remains

with the plaintiffs. Just because the western boundary in the sale deed Ex.A10 is not mentioned as land retained by the plaintiffs predecessor-in-title, but referred as koil maniyam, will not give any right or title to Muthaiya Pillai or his successors- in-title over and above the land measuring 48 feet x 105 feet.

29. The principles boundary will prevail over the extent, is applicable only when the boundaries are referred correctly and the intention of the parties to the documents from the recital lend credence to the boundaries mentioned. In this case, on facts the title deeds carry linear measurements, extent and boundaries. The parties do not dispute the linear measurement. As far as the extent is concerned, admittedly they say that the extent is shown in excess as 13 cents in Ex.A4 and 12 cents in Ex.A10. As per the linear measurements, it could be only about 6 ½ cents and 11 ½ cents respectively. As far as the boundaries are concern, again in their own pleadings omission and error in describing boundaries is admitted.

30. In such circumstances, when linear measurements alone is consistent, the general rule that the boundary will prevail over extent is not applicable. More particularly, when the parties concede that boundaries of their documents are not correct.

31. In this aspects, this Court has already laid down certain principles, when boundaries should prevail over the extent. In *Dhinamalar Publications a Tamil Daily rep.by its Partner R.Krishnamoorthy v. The Tiruchirapalli Municipality rep. By its Executive Authority*, The commissioner and others reported in 1984 MLJ 306 at para 9, this Court has held that

"(i) In case of doubtful or varying extents in the documents of title relating to the property, boundaries should be preferred to the extent;

(2) Only in the absence of definite material to show the actual extent intended to be sold, the boundaries should out weight the doubtful extent mentioned in the document;

(3) If the recitals in the documents and the circumstances of the case show that a lesser extent only was conveyed than the area covered by boundaries, and there is clear evidence as to the intention of the parties with reference to the extent conveyed then the extent should prevail over the boundaries bearing in mind the above said principles, we will have to examine the facts of this case.

32. In *Ramaiya Asari v. Ramakrishnan Naicker and others* reported in 2003 (3) MLJ 327, this Court has observed that:

"Where the deed sets out the extent and measurements correctly, there can be no difficulty in determining the subject-matter of the grant. But where no measurements are given or the extent mentioned in the deed is either vague or is only a rough and ready approximation, one has to look to other indications in the deed in order to fix the identity of the property which is the subject of the grant. If the deed in question sets out the boundaries of the property conveyed, then these boundaries will have to be accepted as a clear reflection of the intention of the grantor and they will conclude not only the exact positioning of the property conveyed, but also its true extent. The boundaries given in the deed will also, in such cases, prevail over the measurement given in the deed, if these are given as approximations."

As far as facts of this case is concerned, the extent is only rough and approximates. Contrarily the linear measurements are specific and not disputed.

33. In the above legal matrix, the facts in dispute would certainly lead to the singular conclusion that the intention of the parties to the sale deed Ex.A10 as found in its recital emphasises only the linear measurement and not extent or boundaries. Therefore, omission to say in the recital that the vendors have retained portion of the land in S.No.51/5 on the west is immaterial. The buyer or his successors-in-title cannot take advantage of the said omission or claim title over the land in excess to 48 feet x 105 feet, which was conveyed.

34. The defendants are the subsequent purchasers of the land which was earlier purchased by Muthaiah Pillai under Ex.A10. Their right is confined within 48 feet x 105 feet and not beyond that. As pointed earlier under Ex.A4, Meenakshi Ammal had sold 30 feet x 105 feet land on the east extreme to Hassankhan Sahib long before Ex.A10. The parties in the present proceedings disputing over the portion retained by Meenakshi Ammal after alienating a portion of her property to Hassankhan Sahbi. While so, Hassankhan Sahib is not at all a necessary party. The Courts below has rightly negatived the plea of the appellants on this issue. Therefore, the question of law, whether the suit is maintainable without impleading Hassankhan Sahib is to be negatived outright.

35. The learned Senior Counsel appearing for the appellants and the Senior Counsel appearing for the third respondent submitted that the Courts below have erred in considering the materials urged by the plaintiffs beyond their pleadings. The versions introduced in the deposition without pleadings were considered by the Courts below. They submit that the plaint averment admits that in Ex.A10, the western boundary is wrongly mentioned as Temple land instead of land retained by Meenakshi Ammal. This document is of the year 1950. The plaintiffs have filed the suit in the year 1996 claiming the right over 'A' and 'B' schedule properties, which were already alienated by their mother and maternal uncle, over which, thereafter they never had possession.

36. To buttress their submissions, the learned Senior Counsels rely on the judgment rendered by the Hon'ble Full Bench of this Court in B.Suresh Chand v. State of Tamil Nadu rep.by the Secretary Revenue Department, Fort St.George reported in 2006(4) LW 409. The Hon'ble Full Bench of this Court, which considering the consequence of materials facts not pleadings in the plaint, in the light of Order VI, Rule (2) of C.P.C., after considering decisions of various Courts on this point, observed that:

27. Under Section 101 of the Evidence Act, 1872 whoever desires any court to give judgment as to any legal right or liability depending on the existence of facts which he asserts, must prove, that those fact existed. Therefore, it is for him to establish that there was no wilful abstention of enquiry or search of the facts, on his part about the vendor before the sale transaction was completed.

28. In this context, it will be useful to refer to Order VI, Rule 2 of C.P.C., which reads as follows:-

"Order VI Rule 2: Pleading to state material facts and not evidence-(1) Every pleading shall contain, and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved."

29. A reading of the above provisions show that the party must plead all material facts on which he means to rely at the trial.

If any one of the material fact is omitted, the statement of claim is bad and it would mean no pleading and no cause of action for the suit. If material facts are not pleaded, a court cannot permit evidence to be led. In 1977 (1)S.C.C. 511 (Udhav Singh vs. Madhav Rao Scindia) the Supreme Court has defined the expression "material facts" in the following words:-

"All the primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence are material facts."

30. The distinction between "material facts" and "particulars" cannot be overlooked. Material facts are primary and basic facts which must be pleaded by the party in support of the case set up by him, either to establish his cause of action or defence. Since the object and purpose is to enable the opposite party to know the case he has to meet, in absence of pleading a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit. Particulars, on the other hand, are the details of the case. They amplify, refine and embellish material facts. They give the finishing touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative."

37. After laying down the law distinguishing the expression "material facts" and "particulars" in the context of Order VI Rule 2 C.P.C. on facts, the Hon'ble Full Bench held that the initial burden is on the purchaser to plead and place material facts to show that he is a bona fide purchaser. Very little evidence is sufficient to discharge the said onus. In case of no such evidence, the plaintiffs have to fail.

38. In the present case, the plaint averments, which is extracted in the introduction part of this judgment, does not fail to disclose any material facts. The documents and the oral evidence relied on by them is only to substantiate the material facts. No new version contrary to the facts pleaded is canvassed or considered by the Courts below.

39. In this regard, the judgment reported in AIR 1962 ML 219 later followed by the Division Bench of this Court in T.L.Sadagopan etc and 7 others v. T.N.K.Ramanujam and 10 others

reported in 1993 (2) LW 387, which are relied by the Senior Counsel appearing for respondents 1 and 2 herein gives quietus to this issue

40. The Division Bench of this Court referring the judgment of Thirumalai Iyengar v. Subba Raja reported in 1962-1-MLJ 193, has held that:

"30. In Thirumalai Iyengar v. Subba Raja 1962-1-M.L.J, 193 Jagadisan, J. held that the duty of the Court is to give effect to the inference to be drawn from the evidence on record and it is not prevented from recording a finding which may not be consistent with the pleadings of either party in a suit". With respect, we agree with the learned Judge and hold that the principle is applicable in this case."

41. The boundaries were not correctly mentioned in the sale deeds and parties to the documents were particularly concerned only with regard to the linear measurements. In all the documents, subsequent to Ex.A4, the boundaries are not mentioned correctly. After Meenakshi Ammal sold the portion to Hassankhan Sahib under Ex.A4, in the subsequent sale deed Ex.A10 the eastern boundary should have been mentioned as land of Hassankhan Sahib. Contrarily the eastern boundary is shown as Police lane. In Ex.A10, the northern boundary is Thulasinga Mudaliar Stone House. Records indicates that the land in S.No.51/5 on its north in the western end, the temple land is located. On the eastern end, Thulasinga Mudaliar stone house is located.

42. As far as the appellants are concerned, their source of title begins from Ex.A10 which is the sale deed by Ramasamy and Rengammal in favour of Muthaiya Pillai on 15.06.1950. After purchasing the land measuring 48 feet x 105 feet in S.No.51/5 lying immediately next to the land sold to Hasankhan Sahbi under Ex.A4, Muthaiya Pillai has sold the land to Subankhan Sahib under Ex.A11 on 14.05.1956. In this document, vacant land measuring 48 feet east-west x 105 feet south-north has been conveyed. The boundaries for this property is shown as south of Thulasinga Mudaliar stone house, east of Thirukovilur Thiyaleeswara Perumal koil maniyam, north of police lane, west of the road leading to police line. The east and west boundary of the suit property is not rightly described. So, there again only the linear measurement is consistent. After purchasing the land under Ex.A11, Subankhan Sahib has sold the property to Kairoon Beevi on 24.02.1958 under Ex.A12. The extent boundary and measurement in Exs.A10 and A11 and A12 are identically described.

43. Kairoon Beevi, who purchased the property from Suban Sahib had sold it in two parts, one part on the eastern side to Saraswathi Ammal under Ex.A13 on 03.12.1958. The measurement in this document is mentioned as 23 feet east-west x 105 feet north-south. In this document, Kairoon Beevi has specifically mentioned that she has retained the remaining portion of the land on the western side and shown her thatched house and farm as the western boundary. In the northern side, Thulasinga Mudaliar stone house is shown as the boundary. The remaining extent of land 25 feet x 105 feet retained by Kairoon Beevi was later sold by her to Mohammed Ismail under Ex.A15 on 09.03.1959. In this deed, for the first time, the eastern boundary of the property has been shown as Hasankhan Sahib property and the western boundary is shown as Saraswathi Ammal property. Kairoon Beevi, who is the vendor of Saraswathi Ammal under Ex.A13 and Mohammed Ismail under Ex.A15, has rightly mentioned the boundaries in Ex.A15 in consonance with the sale deed Ex.A4. 23 feet x 105 feet land on the eastern half of the property purchased by Saraswathi Ammal under Ex.A13 was conveyed to Piyari Jan under Ex.A14 dated 25.04.1959. Since in Ex.A10 source document of the defendants, the total extent of the land is mentioned as 12 cents. When the same was divided into two parts and sold by Kairoon Beevi to Saraswathi Ammal and Mohammed Ismail, the extent has been mentioned as about 6 cents and 7 cents in the documents, though the linear measurement is not identical. Thereagain the intention of the parties is made very clear that they were not seriously concerned about the extent but only on the linear measurement.

44. In all these sale deeds, the northern boundary is shown as Thulasinga Mudaliar stone house, so, there is no dispute in identification of the property. Though the boundaries are not clear, the mischief has been crept only when Mohammed Ismail and Piyari Jan has created the document of exchange (Ex.A21). Instead of exchanging the respective property, what they have purchased from Saraswathi Ammal, Mohammed Ismail and Piyari Jan had shown the properties, which they never purchased or had title. Under Ex.A14 Piyari Jan had purchased 23 feet x 105 feet in S.No.51/5 and Mohammed Ismail has purchased 25 feet x 105 feet under Ex.A15. Both Piyari Jan and Mohammed Ismail had no other property in S.No.51/5 neither their vendor had any other property in the said survey number, except the property covered under Exs.A14 and A15.

45. While so, in the exchange deed (Ex.A21), Mohammed Ismail asserting title over the properties. (1) east-west 35 $\frac{1}{4}$ feet on the south, 54 feet on the north; north-south 52 feet on the west, 64 feet on the east and (2) east-west 60 feet on the north; 59 $\frac{1}{2}$ feet on the south; north-south 5 $\frac{1}{2}$ feet vacant

site and Piyari Jan asserting title over the vacant land measuring east-west:36 ¼ feet on the south, 36 ½ feet on the north; north-south 64 feet on the west and 74 ½ feet on the east have exchanged the properties.

46. The measurements of the property alleged to have been owned by Mohammed Ismail and the measurements of the property alleged to have been owned by Piyari Jan, which are the subject matter of the exchange deed, are totally unconnected to the description of the property, which they both purchased from their respective vendor, who in turn points his source to Ex.A1.

47. Further, in the title deed of Mohammed Ismail and Piyari Jan, the extent of the land is mentioned as 7 cents for Mohammed Ismail and 6 cents for Piyari Jan, which is per se over and above the extent mentioned in the parent document Ex.A10. Not stopping with the including of certain properties, which they never had title, they both have created a exchange deed. Thereafter, Piyari Jan had conveyed the property to James Jayakumar, who in turn had sold the portion of the property to Dr.Panneerselvam (first appellant) and the remaining portion of the land transferred to Thamarai Ponmalar, W/o James Jayakumar. In this context, it is essential to point out that the appellants have not properly verified the title of their vendor. Without due diligence, they have been entered into contract. They are not bona fide purchasers with due diligence.

48. In the light of the above discussions, this Court finds that the Questions of Law raised in this second appeal held in affirmative. The Courts below right in holding Hassankhan Sahib is not a necessary party to the suit and the boundaries stated incorrectly will not prevail over the extent. Hence, the judgments and decrees passed by the Courts below are to be confirmed.

49. Accordingly, this Second Appeal is dismissed. The judgments and decrees passed by the Courts below are hereby confirmed. No order as to costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

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To

1.The Additional District Court
(Fast Track Court No.2), Cuddalore .

2.The Subordinate Court,
Panruti.

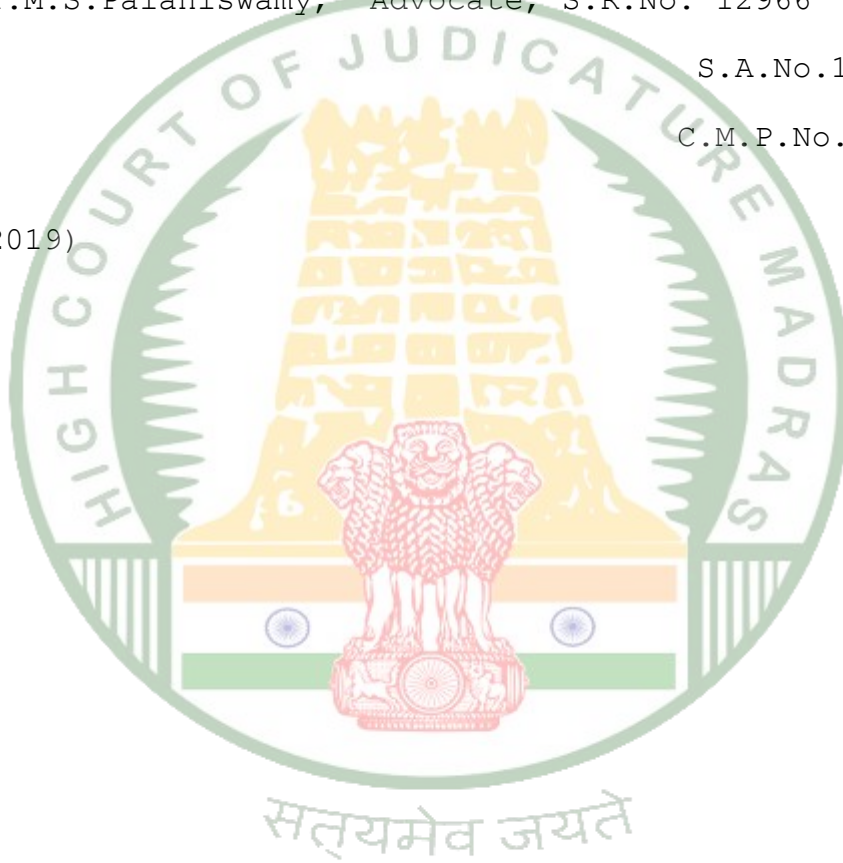
+3cc to Mr.K.A.Vimal Kumar, Advocate, S.R.No. 13139

+2cc to Mr.T.S.Baskaran Advocate, S.R.No. 12672

+1cc to Mr.M.S.Palaniswamy, Advocate, S.R.No. 12966

S.A.No.1060 of 2004
and
C.M.P.No.191 of 2015

AD(CO)
GN(27/04/2019)



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